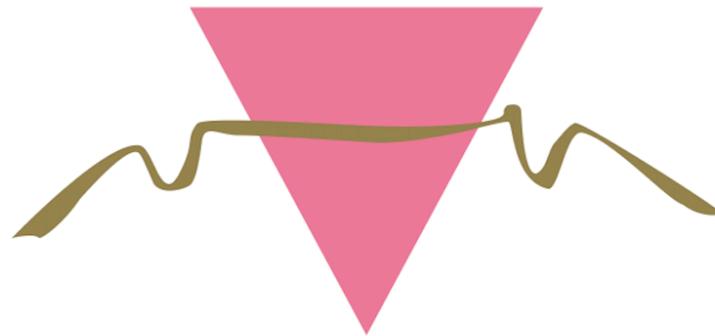


Triangle Project submission
National Action Plan on Racism, Racial Discrimination, Xenophobia and Related
Intolerance



triangle project

Submitted by: Triangle Project

With Endorsements from:
Durban LGBTI Community and Health Centre
Free State Rainbow Seeds
Gay and Lesbian Network, Pietermaritzburg
Gender Dynamix
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1. About

Triangle Project is an LGBTI (lesbian, gay, bisexual, transgender and intersex) human rights organization based in Cape Town and having a footprint in other parts of the Western Cape. We provide direct health and psycho-social services for LGBTI people as well as conduct research, advocacy and empowerment of LGBTI people in the Western Cape. Our organisation's key goals include combating stigma and discrimination against LGBTI people and using community organizing as a form of empowerment, in order to equip LGBTI people with the tools to make a difference.

2. Context of LGBTI people living in South Africa

While all people in South Africa continue to face high levels of crime and violent crime, LGBTI people are especially vulnerable to discrimination and violent attacks including targeted sexual assault and murder. The nature and number of these crimes have been widely documented and have warranted specific interventions from the South African government in the form of the National Task Team on LGBTI and Gender-based violence (the NTT). While it is acknowledged that LGBTI people face higher than average levels of violence because of their gender identity, sexual orientation or body diversity (physical sex characteristics, i.e. the diverse bodies of intersex persons and some transgender persons who access hormones and/or surgery), there has been less focus on the role of discrimination and stigma and its role in denuding the human rights of LGBTI people. For instance, LGBTI learners drop out of school or perform worse at school than their peers because of discrimination; LGBTI people may be denied jobs or other economic opportunities because of who they are or may have been rejected by family or other support structures.

South Africa also plays host to an unknown number of refugees and migrants from other parts of the continent who have left their home country because they are LGBTI. For many of these refugees, the levels of stigma and discrimination are incredibly high, preventing them from establishing anything like an ordinary and dignified life that they have come to South Africa to seek. It is essential that this action plan understand that many people suffer xenophobia, homophobia, transphobia and intersexphobia as well as discrimination because of their race, class and geography.

This level of discrimination all amounts to a systemic prejudice against LGBTI people and one that requires a coordinated and systemic response in order to address.

Our submission will focus on specific issues for LGBTI people living in South Africa that we feel the plan does not address as well as some general issues around the governance and monitoring and evaluation of the plan.

3. Commentary on the NAP

3.1 Lack of context and intersectionality

The NAP contains valuable information and context about the issues the plan seeks to address. In this way it situates racism in a South African historical context of Apartheid and settler colonialism as well as its contemporary ramifications of inequality of both opportunity and outcome.

While there is valuable input on the foundations and manifestations of racism, there is no real discussion about the foundations of other related intolerance including that against LGBTI people. It is vital for a plan that seeks to craft a response to discrimination and violence against LGBTI people to contain a thorough understanding of the roots and expression of this bigotry.

Further to not being included in the same way as racism in the plan, LGBTI people are also not included in a meaningful way regarding the other prejudices they face. This can be seen in the contextual discussion around employment which discusses imbalances on the grounds of race and gender but does not examine the role that sexual orientation, gender identity, body diversity (physical sex characteristics) or legal status may have on individuals.

Recommendation: The NAP must include full discussions of LGBTI people who are included in the plan. This discussion should include, but not be limited to

- historical context of homophobia, transphobia, intersexphobia and other forms of intolerance against LGBTI people;
- the current context including high levels of violence and discrimination;
- the current context of our understanding of drivers of this violence and discrimination including the role of violent patriarchy, heteronormativity, cisnormativity and sex-binarism and the narrow interpretation of religion and culture;
- the intersecting nature of LGBTI people which understands that LGBTI people continue to face discrimination based on race, class, national origin and other factors and that this impedes their access to economic, educational and other opportunities over and above other issues.

3.2 Definitions in the NAP

The definitions section in the NAP leaves some gaps and in other cases does not speak to existing legislative commitments. Below is our commentary as well as some recommended changes.

Discrimination

Recommended: Include the word 'unfair' and make specific reference to which listed grounds are being referred to.

Gender-based discrimination

We strongly object to this definition on two grounds:

This definition incorrectly conflates gender and sex. Gender is purely a social construct, according to which we as a society typically associate certain behavioural, cultural, or psychological traits with so-called femininity on the one hand, and so-called masculinity on the other. Sex refers to only to physical, biological characteristics of the human body, including female, male, intersex and sex-related physical body alterations (as in the case of some transgender persons). Gender discrimination therefore is not limited to female-bodied persons, although women are often the victims of gender discrimination.

It is also unclear why the section seeks to define gender discrimination, and not all forms of discrimination on each of the prohibited grounds. Further, this definition does not leave room for discrimination against people based on their gender identity or sex-related bodily diversity (e.g. intersex persons) nor does it understand the existence of gender fluidity or diversity of sexes existing on a spectrum.

Recommendation: We recommend that this definition is either removed in its entirety, alternatively, each form of discrimination on the basis of a listed ground should likewise be defined.

Hate Crimes

It is important that this definition reflects the draft Prevention and Combatting of Hate Crimes and Hate Speech Bill, especially in relation to the listed grounds that are included.

Recommendation: Definition replaced by the following:

A hate crime is an offence recognized under any law / the common law or any statute, committed solely or in part because of the fact or perceived fact of the victim's:

1. *age,*
2. *belief,*
3. *birth or*
4. *colour,*
5. *conscience,*
6. *culture,*
7. *disability,*
8. *ethnic or social origin,*
9. *gender identity and gender expression,*
10. *gender,*
11. *health status,*
12. *language,*
13. *nationality,*
14. *occupation,*
15. *race,*
16. *religion,*
17. *sex and sex characteristics/body diversity (including intersex and other forms sex-related body diversity, such as transgender persons accessing hormones or surgery), or*
18. *sexual orientation.*

Further, this definition should be the 'listed grounds' that are used when referred to elsewhere in the document.

Hate Speech

The definition of hate speech in our law is already captured in PEPUDA and will be included in the criminal law through the Prevention and Combating of Hate Crime and Hate Speech Bill to be tabled. It is essential that the definition, as well as the listed grounds it relies on speaks to the definition of hate crime set out above as well as other legislative commitments.

Recommendation: The definition of hate speech is replaced with the formulation in the Prevention and Combatting of Hate Crime and Hate Speech Bill.

Institutionalised or structural racism

While this definition itself does not need to change, it raises questions about the position of other forms of intolerance in the NAP. None of the other forms of intolerance have this definition to show the ideological grounding of the NAP.

Recommendation: Include definitions for other forms of discrimination. This could be done through the inclusion of terms such as 'homophobia', 'transphobia', intersexphobia, 'heteronormativity', 'cisnormativity' and 'sex-binarism'.

We think it is important that heteronormativity in particular is defined as: Heteronormativity is the institutionalisation of exclusive heterosexuality in society. Based on the assumption that there are only two fixed sexes, namely female and male (sex-binarism), and that each has predetermined gender roles, it pervades all social attitudes, but is particularly visible in “family” and “kinship” ideologies”. This is further related to cisnormativity, the assumption that each person has or should have a fixed and binary gender identity (woman/man, girl/boy) that is the same as the gender that society assigned to them at birth, resulting in the marginalisation of and discrimination against transgender and other gender diverse people. Additionally, it is based on sex-binarism that leads to gross human rights violations against intersex persons, whose bodies are often subjected in infancy, childhood or adolescence to intense scrutiny, display and medical and surgical interventions in the absence of full, free informed consent.

New forms of intolerance

It is troubling that homophobia is included under the heading of “new forms of intolerance” especially in light of the failure of the policy to give prejudice against LGBTI people its proper historical positioning. Furthermore, homophobia is used in this definition but is actually a term that only applies to people who identify as gay or lesbian.

Recommendation: The term “homophobia” should be replaced, with “discrimination against LGBTI people”, alternatively, the terms “transphobia” and intersexphobia should be inserted alongside homophobia.

Prohibited (listed) grounds

As set out above, this list most correspond with other mentions of the list in this action plan as well as the most comprehensive set of grounds existing in legislation – such as the Prevention and Combating of Hate Crimes and Hate Speech Bill.

4. Gaps in the NAP.

4.1. Role of the State. Nowhere in the NAP is there an admission that the state itself is potentially racist or discriminatory, which is especially important when the state is intended as a point of access to redress. Examples of this is the SAPS being in breach of the anti-profiling clause of the **Durban Declaration** of the WCAR, by its Operation Fiela which has witnessed the ethnic and colour profiling of people resident in South Africa in order to deport undocumented migrants, and by various government departments and social institutions being in breach of the Durban Declaration by gender profiling for instance discriminating against single mothers whereas the Durban Declaration stands against all forms of discrimination “including their gender manifestations” – which is meant to include men, women, transgender and intersex people.

4.2. Role of the Private Sector. While the private sector is mentioned in the NAP, it is not given full responsibility as a transformative, anti-discriminatory agency, beyond its obligations under BBBEE and equality legislation, and is not seen as a potential co-funder of the NAP.

4.3. Role of the Media. The NAP imposes obligations on the media both in their promotion of equality and social cohesion, as well as interrogating their own production of discriminatory material. But because the NAP was developed so long after the Durban Declaration when the internet was young, we feel there is an overemphasis on ephemeral social media.

4.4. Migrant Rights. Although the NAP commits to “Gender equality, Anti-LGBTI discrimination, Economic opportunities for all, and Eradicating the legacy of apartheid,” there are no NAP obligations on the Department of Home Affairs (DHA) regarding migrant’s rights. This is vital if xenophobia is to be adequately combated. We note that the state is currently weak in this regard in that it shut down many Refugee Reception Centres, making access to asylum-seeking and other forms of migrancy documentation more difficult, and that the Hate Crimes Working Group is not represented in many of the border provinces that are the first ports of call for incoming migrants.

This gap is particularly problematic for LGBTI refugees and foreign nationals who suffer increased discrimination and misinformation because of their sexual orientation or gender identity.

4.5. Public Education. The NAP merely states that the public should be aware of the NAP itself, but there is no proper public education campaign including in via the

schools and universities and via social media on why combating discrimination is so important.

4.6. Sanctions. There is nothing in the NAP about the actual legal, criminal, social or other consequences of discrimination. In fact a debate needs to take place on what criminal sanctions (if any) should be applied to those individuals, groups and institutions found to be in breach of the NAP beyond those found guilty of criminal acts under existing legislation. We would prefer the principle of restorative justice to apply. Lesser offences might have some sort of social sanction applied such as a required public apology, while more serious offences might be in addition to the current criminal code, be criminalised under legislation such as the **Protection of Constitutional Democracy Against Terrorist and Related Activities Act (2004)**, which outlaws the instigation or use of violence to create feelings of fear, terror or uncertainty within a segment of the public, or the **United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948)**, to which South Africa acceded in 1998, which outlaws certain xenophobic statements and acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” as genocide.

5. Governance structures

5.1. Oversight. The proposed governance models include either putting the NAP under the South African Human Rights Commission (SAHRC), or under a Section 9 institution, or under a single Ministry, or to create a new national co-ordinating structure. That governance body would then oversee the NAP National Steering Committee (NSC) – consisting of relevant government departments, Section 9 institutions, and CSOs – which would then convene a Rapid Response Mechanism (RRM). Given the existing instruments like the Equality Courts and that the result of its interventions may result in court actions, it may be best that the Ministry of Justice and Constitutional Development is best in order to centralise ongoing cases and provide a direct line of information to decision-makers to use political / bureaucratic clout to deliver speedy results.

5.2. The National Steering Committee. The NSC should be structure to ensure cordial and functional intersectional partnerships between the relevant government departments, Section 9s, and CSOs, and that CSOs that do not sit on the NSC have easy access to the NSC to provide input on the NAP as it rolls out. We are currently concerned that the NSC is insufficiently representative of civil society as many CSOs were not made aware of the process or invited to sit on the NSC.

5.3. The Rapid Response Mechanism. It is not clear from the governance model whether the RRM envisaged is a rapid-response task team like the LGBTI rapid-response task team which is supposed to track anti-LGBTI hate crimes – which we would prefer – or some other mechanism. We would like to see an RRM that is indeed very mobile, responsive and fast-acting, regardless of where serious discrimination is occurring.

5.4 Reporting and Investigations The NAP requires a mechanism for reporting to its governance body, NSC, and RRM that will require reporting on the status of risks and imminent threats, not merely on the past performance of the NAP – but the governance model does not make this clear. The NAP needs to have capacity for intelligence-gathering on looming threats, legal case-building, empirical statistics, data and evidence-collection, police investigating, monitoring and evaluation (M&E), and media monitoring, in order for the RRM to adequately intervene in emergencies, and for the NAP to devise broader structural interventions.

6. Legislation & Policy.

6.1. Alignment. There is concern from the legal community about the alignment of NAP with the Constitution, PEPUDA, and other relevant legislation and policies. If it is not constitutionally aligned it will inevitably wind up being challenged in the Constitutional Court.

6.2. Duplication. There is concern that the NAP does not sufficiently focus on existing anti-discriminatory mechanisms such as the Equality Courts – which deserve to be adequately strengthened under NAP – and that it will lay the groundwork for a Hate Crimes Bill that will wind up being an unnecessary duplication of PEPUDA and other relevant legislation and policies.

6.3. Best Practice. It is suggested that the drafters look at best practices regarding NAPs both at home and abroad, so for instance, the Department of Social Development’s excellent NAP on Adolescent Sexual and Reproductive Health Rights, or at examples of similar NAPs from Brazil which is a socially comparable country.

7. Timeline & Budget.

7.1. Timeline. Although the NAP is supposed to be implemented over 2016-2021, we are already deep into 2016, so it is likely to only kick off in 2017, and yet other than the National Steering Committee (NSC), no mechanisms are yet in place. There has been inadequate public consultation about CSO and civil society’s role on the NSC. The NAP also lacks a detailed implementation and outcomes timeline.

7.2. Budget. The funding of the NAP is not discussed, whether government departments will be asked to find the implementation within their existing budgets or whether they will be given an additional budget line. Is there a possibility of asking the private sector to contribute towards the funding? Vitaly, there is nothing in the NAP that mentions how existing institutions such as the Equality Courts will be funded; they have in fact been underfunded, as have the Rape Courts which are similarly important as NAP implementing agencies. Ultimately, whether or not Treasury allocates a ring-fenced line-item funding the NAP will determine whether it succeeds or fails.

8. Conclusion

The NAP has an ambitious vision but unfortunately lacks a clear plan and does not substantively include LGBTI people or examine the role of intersecting vulnerabilities. We are very concerned by the limited detail in the action plan and lack of clarity regarding costing and implementation.

We hope that our recommendations above are taken into account, but in addition, we hope that the NAP is given the time it needs to be properly reexamined in order to fulfill its commitment to the Durban Declaration as well as our Constitution.